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7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF OREGON**  
9 **PORTLAND DIVISION**  
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11 **FLIR SYSTEMS, INC.**, an Oregon  
12 corporation,

No. 3:10-cv-00971-HU

13 Plaintiff,

**OPINION AND ORDER**

14 v.

15 **FLUKE CORPORATION**, a Washington  
16 corporation,

17 Defendants.  
18

19 \_\_\_\_\_  
20 Devon Zastrow Newman, Schwabe, Williamson & Wyatt, P.C., Portland,  
Oregon, for plaintiff FLIR Systems, Inc.

21 William A. Brewer III, Michael J. Collins, C. Dunham Biles, and  
22 Robert M. Millimet, Bickel & Brewer, Dallas, Texas, for plaintiff  
FLIR Systems, Inc.

23 Kenneth R. Davis II and Parna A. Mehrbani, Lane Powell P.C.,  
24 Portland, Oregon, for defendant Fluke Corporation.

25 Caroline M. McKay, Dane H. Butswinkas, and Matthew V. Johnson,  
26 Williams & Connolly LLP, Washington, District of Columbia, for  
27 defendant Fluke Corporation.  
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1 HUBEL, J.,

2 There are eight *Daubert* motions before the Court in this  
3 Lanham Act case: (1) Defendant Fluke Corporation's ("Fluke") motion  
4 to exclude the testimony of William Bisenius ("Bisenius"); (2)  
5 Fluke's motion to exclude the testimony of Dr. Jacob Jacoby; (3)  
6 Fluke's motion to exclude the testimony of Dr. Robert Madding and  
7 strike his September 21, 2012 Supplemental Report; (4) Fluke's  
8 motion to exclude the testimony of Robert James Seffrin  
9 ("Seffrin"); (5) Fluke's motion to exclude the testimony of Bruce  
10 Silverman ("Silverman"); (6) Fluke's motion to exclude portions of  
11 Dr. Keith Ugone's testimony; (7) Fluke's motion to exclude the  
12 testimony of Dr. Allen Waxman; and (8) Plaintiff FLIR Systems,  
13 Inc.'s ("FLIR") motion to exclude certain opinions and testimony of  
14 Fluke's expert, Dr. Eric Joachimsthaler. The motions are based on  
15 *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 591-99 (1993)  
16 (indicating district courts analyzing the admissibility of  
17 scientific opinion testimony under Federal Rule of Evidence 702  
18 must ensure that the testimony is based on scientifically valid  
19 principles and is relevant to the facts in issue).

20 The Ninth Circuit discussed the requirements for admissibility  
21 of an expert's opinion in *Primiano v. Cook*, 598 F.3d 558 (9th Cir.  
22 2010). As the Ninth Circuit explained,

23 *Daubert* held that Federal Rule of Evidence 702 replaces  
24 the old . . . gatekeeping test, [e.g.,] general  
25 acceptance in the particular field, with a different test  
26 which is, in some respects, more open to opinion  
27 evidence. The requirement that the opinion testimony  
28 'assist the trier of fact' 'goes primarily to relevance.'  
For scientific opinion, the court must assess the  
reasoning or methodology, using as appropriate such  
criteria as testability, publication in peer reviewed  
literature, and general acceptance, but the inquiry is a  
flexible one. Shaky but admissible evidence is to be

1 attacked by cross examination, contrary evidence, and  
2 attention to the burden of proof, not exclusion. In sum,  
3 the trial court must assure that the expert testimony  
both rests on a reliable foundation and is relevant to  
the task at hand.

4 *Primiano*, 598 F.3d at 564 (internal quotation marks and citation  
5 omitted).

6 With respect to Bisenius, Fluke seeks to exclude (1) Bisenius'  
7 opinion that Sierra Media, Inc. ("Sierra") is not an independent  
8 third-party; (2) Bisenius' testimony concerning the state of any  
9 thermal imaging cameras after they were dropped in Fluke's testing;  
10 (3) Bisenius' opinions regarding what is implied by the drop test  
11 video; and (4) Bisenius' opinion that the testing in the drop test  
12 video is inconclusive and invalid.

13 Fluke's motion to exclude the aforementioned portions of  
14 Bisenius' testimony is granted in part and denied in part. Bisenius  
15 will be allowed to (1) define what it means to be an independent  
16 person or entity in terms of product testing; (2) explain and opine  
17 as to whether the drop test video was inconclusive, invalid or  
18 likely to generate results capable of being reproduced; and (3)  
19 explain what he observed in comparing the raw footage of the drop  
20 testing and the edited version. Bisenius will not be allowed to  
21 testify about whether any particular camera did or did not function  
22 after being dropped, nor the implied message of the final video.  
23 While Bisenius has the qualifications to opine on the validity of  
24 test procedures his background does not render his opinions of  
25 assistance to the jury on the thermal imaging cameras' ability to  
26 survive the drop test. That is beyond his expertise.

27 Fluke moves to exclude the testimony of Dr. Jacoby, proffered  
28 by FLIR in response to the expert testimony of Dr. Joachimsthaler

1 regarding Fluke's IR Fusion mark. Dr. Jacoby describes the purpose  
2 of his report to be the evaluation of the report of Dr.  
3 Joachimsthaler. Dr. Jacoby's report then proceeds to evaluate Dr.  
4 Joachimsthaler's report without offering a single positive or  
5 affirmative opinion of Dr. Jacoby's. It is simply a point by point  
6 criticism of Dr. Joachimsthaler's report indicating each instance  
7 in which Dr. Jacoby believes Dr. Joachimsthaler is wrong. Dr.  
8 Jacoby never offers his opinion on the issues on which Dr.  
9 Joachimsthaler was asked to opine. There is no indication Dr.  
10 Jacoby undertook any efforts to familiarize himself with the  
11 information Dr. Joachimsthaler evaluated in order to form his own  
12 opinions.<sup>1</sup> See *Advanced Telemedia, LLC v. Charter Commc'ns, Inc.*,  
13 No. 05-cv-2662, 2008 WL 6808442, at \*1 (N.D. Ga. July 17, 2008)  
14 (excluding expert testimony based on similar deficiencies).

15 For the foregoing reasons, and because there is nothing within  
16 Dr. Jacoby's report that amounts to more than attorney argument or  
17 suggested cross examination subjects for Dr. Joachimsthaler, the  
18 motion to exclude Dr. Jacoby is granted.

19 With respect to Dr. Madding, Fluke moves to exclude his  
20 testimony regarding a Fluke advertisement that contained a higher  
21 resolution photo superimposed onto a lower resolution camera's LCD  
22 screen. Fluke contends that Dr. Madding's testimony concerns  
23 matters that are not in dispute and that can be presented to the  
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25 <sup>1</sup> This is dangerously close to expert testimony that amounts  
26 to simply an opinion on the credibility of another witness which is  
27 not allowed. *Goodman v. Harris County*, 571 F.3d 388, 399-400 (5th  
28 Cir. 2009); *United States v. Schmitz*, 634 F.3d 1247, 1268-69 (11th  
Cir. 2011); *State v. Milbradt*, 305 Or. 621, 624, 756 P.2d 620  
(1988) (since there are state trademark infringement claims  
involved here).

1 trier of fact via party opponent admissions and lay witness  
2 testimony. Fluke also seeks to strike Dr. Madding's September 21,  
3 2012 Supplemental Report and exclude any testimony by him about its  
4 contents because it is "inexplicably late" and does not correct any  
5 inaccuracies in Dr. Madding's March 12, 2012 affirmative  
6 disclosure.

7 I grant Fluke's motion to strike Dr. Madding's September 21,  
8 2012 Supplemental Report because it was not in compliance with the  
9 deadline the Court set for expert witness disclosures. Dr. Madding  
10 will not be allowed to testify about its contents. However, in  
11 light of the questions the information in Madding's Supplemental  
12 Report raise about the accuracy of the Fluke interrogatory  
13 response, the disclosed ads, if a proper foundation and  
14 authentication is made, might be available to FLIR as impeachment  
15 evidence. No ruling is made here in that regard.

16 Fluke's motion is denied with respect to Dr. Madding's  
17 testimony regarding the Fluke advertisement he discovered that  
18 contained a high resolution image superimposed onto a low  
19 resolution camera's LCD screen. FLIR, not Fluke, controls how FLIR  
20 chooses to prove this point.

21 Next, Fluke challenges Seffrin's testimony that was offered in  
22 response to Fluke's damage expert, Serena Morones ("Morones"), and  
23 Fluke's branding expert, Dr. Joachimsthaler. Because Seffrin does  
24 not rebut Morones' calculations and simply criticizes her  
25 assumption of liability, Fluke's motion is granted on this subject.  
26 Jury instructions regarding expert witnesses and attorney argument  
27 is all that is necessary on this topic with Morones.

1       Fluke's motion also challenges Seffrin's testimony that  
2 responds to the affirmative disclosures of Dr. Joachimsthaler,  
3 Fluke's motion is denied. Seffrin in addition to owning and  
4 operating dozens of thermal imaging systems manufactured by both  
5 FLIR and Fluke and working as a consultant regarding thermal  
6 imaging systems over the years since 1984, has, since 1997, ". . .  
7 trained and certified thousands of individuals from around the  
8 world in the proper selection and use of thermal imaging equipment  
9 for a wide variety of applications. Applications have included,  
10 but are not limited to: electrical systems, mechanical systems,  
11 roofing systems, building envelopes, and petrochemical processing."

12       With this background Seffrin offers in rebuttal to Dr.  
13 Joachimsthaler, opinions about the usefulness of the IR Fusion  
14 function of the Fluke thermal imaging cameras, and the importance  
15 of the feature to consumers based on his experience working with  
16 them over the years. This is a proper subject matter for him to  
17 testify on given his experience, therefore I deny Fluke's motion to  
18 exclude this testimony.

19       With respect to Silverman, Fluke contends that (1) Silverman  
20 possesses no specific knowledge or expertise that allows him to  
21 opine on "custom and practice" in the commercial handheld thermal  
22 imaging industry market; (2) Silverman has no reliable basis for  
23 his testimony that consumers are not deceived by FLIR's practice of  
24 superimposing higher resolution images onto the LCD screen of lower  
25 resolution cameras in its advertisements; and (3) Silverman is not  
26 qualified to state his opinions in response to Dr. Joachimsthaler's  
27 opinion regarding the IR Fusion mark.

1 Here, Fluke's motion to exclude Silverman's testimony is  
2 granted in part and denied in part. Silverman has wide experience  
3 in the advertising industry developing ad campaigns for a very  
4 diverse range of products. This experience however does not include  
5 any experience with advertising campaigns in the thermal imaging  
6 market. Indeed, when asked about his knowledge and experience of  
7 the thermal imaging camera market Silverman gave this testimony:

8 Q. Who else cuts and pastes images from higher resolution  
9 cameras onto the screens of the lower resolution cameras other  
10 than FLIR?

11 A. I can't answer that.

12 Q. Okay. Is that something you looked into to determine  
13 whether it's a custom and practice in the thermal imaging  
14 camera industry?

15 A. In that industry? No I haven't."

16 (Mehrbani Decl. Ex. 17 at 209:5-12.)

17 Therefore, testimony about the custom and practice regarding  
18 advertising in the thermal imaging camera industry is outside  
19 Silverman's experience and outside his expertise. However, he is  
20 allowed to testify about how persuasive ads and in particular the  
21 use of images within persuasive ads are developed and presented to  
22 consumers generally. Likewise, it is within his area of expertise  
23 to testify generally about how a company creates and promotes brand  
24 equity for its products in its advertising. What particular  
25 features are important to consumers of thermal imaging cameras  
26 appears to be completely beyond Silverman's personal knowledge or  
27 expertise and therefore is an inappropriate subject for his  
28 testimony.

29 While FLIR contends that all of Silverman's opinions are  
30 reliable because they are "based on his specialized knowledge,

1 experience, and expertise, which are informed by empirical  
2 research," FLIR fails to identify either in its memorandum or at  
3 oral argument what empirical research Silverman relies upon.  
4 Likewise Silverman identifies none in his expert disclosures.  
5 Silverman does offer opinions regarding the use of motion video and  
6 photographs in advertising media particularly when they are smaller  
7 than life-size images. This general testimony is clearly within his  
8 expertise and will be allowed.

9 While it is not clear that FLIR contends that the validity of  
10 the IR - Fusion trademark or the laches defense are appropriate  
11 subjects for Silverman to opine on, I want to be clear, they are  
12 not.

13 Fluke's argument regarding Dr. Ugone's testimony is twofold.  
14 First, Fluke asserts that Dr. Ugone's calculations of FLIR's  
15 incremental profit per camera to determine lost profits is merely  
16 basic arithmetic, not expert in nature, and not helpful to the  
17 jury. Second, Fluke argues that Dr. Ugone's "bald assertion" that  
18 there is an economic causal link between the drop test video and  
19 FLIR's asserted harm is neither based on his economic expertise,  
20 nor the result of any reliable methodology. Here, I deny Fluke's  
21 motion to exclude Dr. Ugone's testimony as to FLIR's incremental  
22 profit per camera to determine lost profits, and I grant Fluke's  
23 motion to the extent it seeks to exclude Dr. Ugone's "economic  
24 causal link" opinion. In the Court's view, this opinion was not  
25 based on a reliable methodology and appears to be based on loose  
26 conjecture and speculation. It is little more than an expert  
27 telling the jury that the likely arguments from counsel should be  
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1 accepted by the jury and seems free of any discernable anchor to  
2 Dr. Ugone's expertise in economics.

3 Fluke moves to exclude Dr. Waxman's testimony in its entirety.  
4 In particular, Fluke takes issue with (1) Dr. Waxman's testimony  
5 regarding the use of fusion and similar terms by himself and  
6 others; (2) Dr. Waxman's opinion that Fluke's IR-Fusion mark  
7 registration was inappropriately awarded; (3) Dr. Waxman's opinion  
8 as to whether FLIR infringed on Fluke's mark; (4) Dr. Waxman's  
9 opinion regarding who invented "image fusion"; (5) Dr. Waxman's  
10 opinion regarding Fluke's intellectual property strategies; and (6)  
11 Dr. Waxman's opinion as to whether Fluke's brand equity in IR  
12 Fusion has been damaged.

13 Here, Dr. Waxman will only be allowed to discuss who coined  
14 the term fusion and how/ where he has seen it used. This  
15 information will assist the trier of fact in determining the  
16 strength of Fluke's mark. As a physicist, Dr. Waxman lacks the  
17 expertise to testify as to the other portions of his testimony  
18 Fluke seeks to exclude.

19 FLIR's argument regarding Dr. Joachimsthaler's testimony is  
20 threefold. FLIR argues that Dr. Joachimsthaler's opinion that (1)  
21 Fluke developed brand equity in its IR Fusion mark, (2) FLIR's  
22 conduct harmed Fluke's brand, and (3) FLIR has caused a likelihood  
23 of consumer confusion should all be excluded because it lacks a  
24 reasonable basis.

25 The crux of FLIR's position centers on the fact that Dr.  
26 Joachimsthaler did not conduct his own consumer surveys regarding  
27 brand equity and consumer confusion. However, FLIR overlooks the  
28 fact that Dr. Joachimsthaler cites a bevy of case-specific

1 evidence, including a 2008 survey commissioned by Fluke regarding  
2 customer purchasing decisions in his report. Accordingly, I deny  
3 FLIR's motion to exclude Dr. Joachimsthaler's testimony.

4 **CONCLUSION**

5 Consistent with the discussion above, and the reasons stated  
6 on the record at the time of oral argument, (1) Fluke's motion  
7 [#239] to exclude the testimony of Bisenius is GRANTED in part and  
8 DENIED in part; (2) Fluke's motion [#233] to exclude the testimony  
9 of Dr. Jacob Jacoby is GRANTED; (3) Fluke's motion [#231] to  
10 exclude the testimony of Dr. Robert Madding and strike his  
11 September 21, 2012 Supplemental Report is GRANTED in part and  
12 DENIED in part; (4) Fluke's motion [#235] to exclude the testimony  
13 of Seffrin is GRANTED in part and DENIED in part; (5) Fluke's  
14 motion [#241] to exclude the testimony of Silverman is GRANTED in  
15 part and DENIED in part; (6) Fluke's motion [#237] to exclude  
16 portions of Dr. Keith Ugone's testimony is GRANTED in part and  
17 DENIED in part; (7) Fluke's motion [#244] to exclude the testimony  
18 of Dr. Allen Waxman is GRANTED in part and DENIED in part; and (8)  
19 FLIR's motion [#228] to exclude certain opinions and testimony of  
20 Dr. Eric Joachimsthaler is DENIED.

21 IT IS SO ORDERED.

22 Dated this 2nd day of November, 2012.

23 /s/ Dennis J. Hubel

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DENNIS J. HUBEL  
25 United States Magistrate Judge  
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